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No. _____

In The

Supreme Court of the United States

DOROTHY J. BARNES, Individually and a/n/f to DERRICK TODD BARNES, JR., a Minor Child,

Petitioners,

v.

THE CITY OF HOUSTON and OTHER UNKNOWN OFFICERS OF THE HOUSTON POLICE DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Whether the timetable allowed for taking an original appeal cuts off the Plaintiffs' right to file a Rule 60(b) motion to correct a judicial mistake due to a change in the decisional law by the Supreme Court of the United States?

2. Whether the trial court erred by denying as moot the Plaintiffs' Motion for Gatekeeper Hearing Under *Daubert* when applied to the law enumerated by the Supreme Court in *Kumho Tire Company, Ltd. v. Carmichael,* 119 S.Ct. 1167 (1999)?

LIST OF PARTIES

Petitioners certify that the following is a complete list of the names of all parties.

PETITIONERS:

Dorothy J. Barnes
Derrick Todd Barnes, Jr.

RESPONDENTS:

The City of Houston
Other Unknown Officers of the
Houston Police Department

ATTORNEYS:

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The City of Houston and
Other Unknown Officers of
the Houston Police
Department

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PRAYER

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners herein pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that court's December 13, 1999 Order in this proceeding.

OPINIONS/ORDERS BELOW

The Order of the United States Court of Appeals for the Fifth Circuit entered on December 13, 1999, and from which review is sought, is attached as Appendix "A."

The Order of the United States District Court for the Southern District of Texas entered August 16, 1999, and from which Petitioners appealed, is attached as Appendix "B."

The Final Judgment and Memorandum and Order of the United States District Court for the Southern District of Texas entered January 20, 1999, are attached as Appendix "C."

The Order denying the Petition for Rehearing En Banc of the United States Court of Appeals for the Fifth Circuit entered January 5, 2000 is reported at ___ F.3d ___ (5th Cir. 2000), and is attached as Appendix "D."

JURISDICTION

The Order denying the Petition for Rehearing En Banc, which was treated as a Petition for Panel Rehearing, of the United States Court of Appeals for the Fifth Circuit was entered on January 5, 2000. This Petition for Writ of Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case arises under the Due Process Clause of the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983 and Rule 60(b) of the Federal Rules of Civil Procedure. The statute and rule are reprinted in the Appendix as Appendices "E," and "F."

STATEMENT OF THE CASE

On October 9, 1997, the Plaintiffs, Dorothy J. Barnes, individually and a/n/f to Derrick Todd Barnes, Jr., a minor child, filed an action against the City of Houston, Sgt. R.L. Doyle, Officer D.S. Null and other unknown officers of the Houston Police Department alleging violations of 42 U.S.C. § 1983 based upon excessive force, inadequate training, inadequate supervision and negligent use of tangible personal property in violation of Tex. Civ. Prac. & Rem. Code § 101.021 ("Texas Tort Claims Act"), which caused the death of the Decedent, Derrick

Todd Barnes. 1 R. 3-14. The Defendants filed their respective answers to the complaint on October 28, 1997, and October 29, 1997. 1 R. 25-44. The Defendants subsequently filed a supplemental answer on April 21, 1998. 1 R. 165-172.

On September 30, 1998, the Defendants filed their Motion for Summary Judgment. 1 R. 186-290. Pursuant to an agreement reached between the parties and approved by the trial court, the claims against Sgt. R.L. Doyle and Officer D.S. Null were dismissed. 2 R. 325-326.

On November 13, 1998, the Plaintiffs filed their Response to Defendants' Motion for Summary Judgment. 2 R. 337-350. On December 9, 1998, the Defendants filed their Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment. 2 R. 351-362. On December 10, 1998, the Plaintiffs filed their Response to Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment. 2 R. 366-369.

On January 20, 1999, the district court entered a Memorandum and Order granting the Defendants' Motion for Summary Judgment. 2 R. 427-441. Concurrently, the district court entered a Final Judgment in favor of the Defendant, the City of Houston. 2 R. 442. On July 19, 1999, the Plaintiffs filed their Rule 60(b) Motion for Relief from Judgment. 2 R. 446-448. On August 16, 1999, the trial court denied Plaintiffs' motion. 2 R. 456-457.

On August 25, 1999, the Plaintiffs timely filed their Notice of Appeal. 2 R. 456-457.

On November 8, 1999, the Defendants filed their Motion to Dismiss Appeal claiming that the Plaintiffs'

brief did not address the trial court's denial of the Rule 60(b) motion. On November 10, 1999, the Plaintiffs filed their Response to the Motion to Dismiss Appeal. On November 15, 1999, the Defendants filed their Reply to Plaintiffs' Response to Defendants' Motion to Dismiss Appeal. On November 17, 1999, the Plaintiffs filed their Response to Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Dismiss Appeal.

On December 13, 1999, a panel of the Fifth Circuit consisting of Smith, Barksdale and Parker, Circuit Judges, dismissed the Plaintiffs' appeal and summarily affirmed the denial of Plaintiffs' Rule 60(b) motion without comment.

On December 16, 1999, the Plaintiffs filed their Petition for Rehearing En Banc. On January 5, 2000, treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the panel denied the Petition for Rehearing En Banc. The present Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of whether the timetable allowed for taking an original appeal cuts off the Plaintiff's right to file a Rule 60(b) motion to correct a judicial mistake due to a change in the decisional law by the Supreme Court of the United States represents an important question which has not been, but should be, decided by the Supreme Court.

It appeared that the Supreme Court would determine the validity of the use of Fed. R. Civ. P. 60(b) to correct a judicial mistake of law due to a complete change in the

decisional law by the Supreme Court while the original appeal was pending in the Court of Appeals when it granted certiorari in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *United States v. Beggerly*, 524 U.S. 38 (1998). The Supreme Court, however, did not reach the specific question in *Landgraf* and *Beggerly* concerning whether the timetable allowed for taking an original appeal cuts off a litigant's right to file a Rule 60(b) motion to correct a judicial mistake due to a change in the decisional law by the Supreme Court. Both *Landgraf* and *Beggerly* were decided on other grounds. The only definitive guidance on this issue is found in Kevin Parker, *Relief from Final Judgment Under Rule 60(b)(1) Due to Judicial Errors*, 83 Mich. L. Rev. 1571, 1577-83 (1985). Moreover, there appears to be a "circuit split" on this very issue. The present case is "ripe" for such a decision, and the Supreme Court is respectfully invited to finally resolve this issue.

II. The Fifth Circuit's decision to dismiss the appeal, without comment, conflicts with its own decisional law and the decisional law of the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Seventh Circuit, the United States Court of Appeals for the Eighth Circuit, and the United States Court of Appeals for the Eleventh Circuit.

The Fifth Circuit, in interpreting Rule 60(b) in a case involving a post-judgment change in controlling decisional law held that if after the time for notice of appeal had run but while the appeal which had been filed in a

timely manner was still pending, the time allowable for taking an appeal does not cut off a litigant's right to file a Rule 60(b) motion within the allotted time. *See Lairsey v. Advance Abrasive Company,* 542 F.2d 928, 932 (5th Cir. 1976).

Absent en banc reconsideration of *Lairsey,* which does not appear likely, the holding above will remain the decisional law of the Fifth Circuit.

The circuits are split on this issue. *Lairsey* is in accord with the decision of the Third Circuit. *See Sleek v. J.C. Penney Company,* 292 F.2d 256 (3d Cir. 1961). The First, Seventh, Eighth, and Eleventh Circuits have taken a countervailing point of view. *See Silk v. Sandoval,* 435 F.2d 1266, 1268 (1st Cir.), *cert. denied,* 402 U.S. 1012 (1971); *Swam v. United States,* 327 F.2d 431, 433 (7th Cir.), *cert. denied,* 379 U.S. 852 (1964); *Fox v. Brewer,* 600 F.2d 177, 189 (8th Cir. 1980); *Parks v. United States Life & Credit Corp.,* 677 F.2d 838, 841 (11th Cir. 1982).

The decision of the panel to dismiss the appeal has created "new law" without en banc consideration by the Fifth Circuit and has violated the Due Process Rights of the Petitioners in the process. Such action is fundamental error. This "new law" has caused an apparent split *internally* within the Fifth Circuit and the decisional law of the Third Circuit on the issue of whether Rule 60(b) can be used to correct a judicial mistake due to a change in the decisional law by the Supreme Court. The decision by the panel and the circuit split in question constitute an intolerable situation which should be resolved by the Supreme Court.

III. The trial court erred by denying as moot the Plaintiffs' Motion for Gatekeeper Hearing Under *Daubert* due to a change in the decisional law by the Supreme Court.

On January 20, 1999, the Court granted the Defendants' Motion for Summary Judgment, entered a Final Judgment in favor of the Defendants and denied as moot Plaintiffs' Motion for Gatekeeper Hearing Under *Daubert*. Subsequent to the entering of the trial court's Final Judgment and after the Plaintiffs had filed their original Notice of Appeal, the Supreme Court of the United States rendered its opinion in *Kumho Tire Company, Ltd. v. Carmichael*, 119 S.Ct. 1167 (1999). The Plaintiffs contend that the holding in *Kumho* entitled them to relief from judgment and a new trial pursuant to Fed. R. Civ. P. 60(b)(6) and by necessity encompassing Rule 60(b)(1).

On October 23, 1998, the Plaintiffs filed their Motion for Gatekeeper Hearing Under *Daubert*. In that motion, the Plaintiffs challenged the Defendants' experts' qualifications and their principle and/or methodology in forming their expert opinions. *See* Fed. R. Evid. 702.

The Court in *Kumho* held that "*Daubert* factors" apply to "all expert witnesses." *See Kumho*, 119 S.Ct. at 1173-79. With this being the case, the only reliable and admissible expert testimony before the Court was that of the Plaintiffs' expert, Dr. McCauley. The Plaintiffs respectfully contend that the trial court reversibly erred and abused its discretion when it granted the Defendants' Motion for Summary Judgment and denied the Plaintiffs' Motion for Gatekeeper Hearing Under *Daubert* as moot.

Since the *Kumho* opinion was pending and not rendered until after the trial court had entered its Final Judgment and after the Plaintiffs had filed their original Notice of Appeal, the Plaintiffs were precluded from moving for a new trial under Fed. R. Civ. P. 59(b) and the issue would not have been before the Fifth Circuit on direct appeal. The filing of a Rule 60(b) motion was and is the proper procedure to call to the trial court's attention a change in the decisional law and to preserve this point for appellate review. *See Lairsey, supra.* Additionally, the *Kumho* ruling represents an extraordinary change in the law, is material and not merely cumulative, and considering this case in light of *Kumho* would probably produce a different result at the summary judgment stage. *Cf. Booker v. Singletary,* 90 F.3d 440, 442 (11th Cir. 1996); *Callahan v. Runyun,* 75 F.3d 1293, 1297 (8th Cir. 1996). The Supreme Court should exercise its supervisory powers over the federal courts to resolve this issue.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the December 13, 1999 Order of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

WILLIE, WILLIE & ASSOCIATES

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20865

DOROTHY J BARNES, Individually,
and as next friend to
Derrick Todd Barnes Jr, a minor child

Plaintiff-Appellant

v.

THE CITY OF HOUSTON; ET AL

Defendants

THE CITY OF HOUSTON; OTHER
UNKNOWN OFFICERS OF THE
HOUSTON POLICE DEPARTMENT

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

---

(Filed Dec. 13, 1999)

Before SMITH, BARKSDALE and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that the motion of appellees to strike appellant's brief is DENIED as moot.

IT IS FURTHER ORDERED that the motion of appellees to affirm the judgment of the District Court is DENIED as moot.

IT IS FURTHER ORDERED that the motion of appellant for sanctions is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOROTHY J. BARNES, ET AL.,	§	
	§	
Plaintiffs,	§	C.A. NO. H-97-3704
	§	
VS.	§	
	§	
CITY OF HOUSTON, ET AL.,	§	
	§	
	§	
Defendants.	§	

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION

(Filed Aug. 16, 1999)

Pending is a Rule 60(b) Motion for Relief from Judgment (Document No. 55) filed by Plaintiffs Dorothy J. Barnes, Individually and a/n/f to Derrick Todd Barnes, Jr., a minor child, to which motion Defendant City of Houston has filed its Response in Opposition.

Plaintiffs argue that the Supreme Court's opinion in *Kumho Tire Company, Ltd. v. Carmichael,* 119 S.Ct. 1167 (1999), decided after Final Judgment was entered in this case, entitles Plaintiffs to relief from judgment and a new trial pursuant to Fed. R. Civ. P. 60(b)(2) and 60(b)(6).

The Final Judgment entered in this case was based on the granting of Defendant's Motion for Summary Judgment. Plaintiffs demonstrated no newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

59(b); and no other reason has been demonstrated that justifies relief from the operation of the Final Judgment. Specifically, the Supreme Court's ruling in *Kumbo Tire Company* provides no basis for relief from the Final Judgment in this case. Accordingly, it is

ORDERED that Plaintiffs' Rule 60(b) Motion for Relief from Judgment is DENIED.

The Clerk shall notify all parties and provides them with a true copy of this Order.

SIGNED at Houston, Texas, on this 16th day of August, 1999.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOROTHY J. BARNES, Individually and a/n/f TO DERRICK TODD BARNES JR., A MINOR CHILD,	§	CIVIL ACTION NO. H-97-3704
Plaintiffs,	§	
v.	§	
THE CITY OF HOUSTON, SGT. R. L. DOYLE, Individually and in his Official Capacity, OFFICER D. S. NULL, Individually and in his Official Capacity, AND OTHER UNKNOWN OFFICERS OF THE HOUSTON POLICE DEPARTMENT,	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Jan. 20, 1999)

For the reasons set forth in the Memorandum and Order signed by the Court this day, it is

ORDERED and ADJUDGED that Defendant City of Houston's Motion for Summary Judgment (Document No. 36) is GRANTED, and Plaintiffs shall take nothing

and their claims against Defendant City of Houston are DISMISSED on the merits.

This is a FINAL JUDGMENT.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, this 19th day of January, 1999.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DOROTHY J. BARNES, Individually and a/n/f TO DERRICK TODD BARNES JR., A MINOR CHILD,	§	CIVIL ACTION NO. H-97-3704
Plaintiffs,	§	
v.	§	
THE CITY OF HOUSTON, SGT. R. L. DOYLE, Individually and in his Official Capacity, OFFICER D. S. NULL, Individually and in his Official Capacity, AND OTHER UNKNOWN OFFICERS OF THE HOUSTON POLICE DEPARTMENT,	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed Jan. 20, 1999)

Pending is Defendant City of Houston's Motion for Summary Judgment[1] (Document No. 36), Defendant City

[1] The Motion was filed also by police officers R. L. Doyle and D. S. Null, but on Plaintiffs' motion, the claims against Defendants Doyle and Null were dismissed after the motion for summary judgment was filed.

of Houston's Supplemental Motion for Summary Judgment (Document No. 37), Plaintiffs' Motion for a Gatekeeper Hearing Under *Daubert* (Document No. 43), Defendant's Motion to Strike Plaintiffs' Experts (Document No. 44-1), and Defendant's Alternative Motion for a *Daubert* Hearing Regarding Plaintiffs' Experts (Document No. 44-2). After having reviewed the motions, responses, replies, and applicable law, the Court concludes that Defendants' Motion for Summary Judgment should be GRANTED, Defendant City of Houston's Supplemental Motion for Summary Judgment should be DENIED, and the remaining motions should be DENIED as MOOT.

I. Background

This is a § 1983 case wherein Plaintiffs allege that the decedent Derrick Barnes was deprived of his Fourth Amendment right to be fee of excessive force when he was shot and killed by officers employed by Defendant City of Houston ("City"). Barnes had been discharging a pistol into the air when the City's police were called to the scene. After ten hours of negotiations, a SWAT team moved into the apartment complex where Barnes was located. When tear gas was deployed, Barnes emerged at the top of a flight of stairs and allegedly pointed a gun at officers positioned at the base of the stairs who returned fire and fatally wounded Barnes. Pursuant to the Texas survivor statute, Plaintiffs, Barnes's survivors, have asserted claims against the City under § 1983 for an unreasonable search and seizure and under the Texas Tort Claims Act for the officers' use of tangible personal property which caused Barnes's death.

II. Summary Judgment Standard

Rule 56(c) provides that "[summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for the motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which the moving party believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *Id.* at 2553-54. A party opposing a properly-supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514-15 (1986). Unsubstantiated assertions that a fact issue exists will not suffice. *See Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993); *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). The nonmovant "must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Krim*, 989 F.2d at 1442.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson,* 106 S. Ct. at 2513-14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, summary judgment is proper. *Kelley v. Price Macemon, Inc.,* 992 F.2d 1408, 1413 (5th Cir. 1993), *cert. denied,* 114 S. Ct. 688 (1994), *citing Matsushita,* 106 S. Ct. at 1351. On the other hand, if "the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id., citing Anderson,* 106 S. Ct. at 2511.

Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson,* 106 S. Ct. at 2513. *Accord, Veillon v. Exploration Services, Inc.,* 876 F.2d 1197, 1200 (5th Cir. 1989); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2728 (1998).

III. Discussion

A. Untimely Response

In its Supplemental Motion for Summary Judgment, the City contends that no issues of material fact exist because Plaintiffs untimely filed their response to the City's Request for Admissions. It is undisputed that October 5, 1998, was the date by which Plaintiffs were

required to respond.[2] Although the certificate of service attached to the response states that service was made upon the City on October 5, the postmark on the envelope which contained the response was dated October 6. (Def.'s Supp. Mot. Summ. J., Exs. C & D.) Thus, the City contends that service was untimely and that all statements are deemed admitted.

Plaintiffs' attorney has filed an affidavit stating that he placed the response in a United States Postal Service mailbox upon leaving work on the evening of October 5. (Willie Aff., Pls.' Resp. Mot. Summ. J., Ex. B.) Fed. R. Civ. P. 5(b) states that "[s]ervice by mail is complete upon mailing." The Second Circuit has addressed this precise issue and held that "service under Rule 5(b) is accomplished when the envelope is deposited at a post office or in a mail box," and not when the Postal Service placed a postmark on the envelope. *See Greene v. WCI Holding Corp.*, 136 F.3d 313, 315 (2d Cir.), *cert. denied*, 119 S. Ct. 448 (1998); *accord United States v. Kennedy*, 133 F.3d 53, 59 (D.C. Cir.) (holding that under Rule 5(b), " '[s]ervice is deemed complete at the instant the documents are placed into the hands of the United States Post Office or a Post Office Box' " (quoting 3D MOORE'S FED. PRACTICE § 5.04[2][a])), *cert. denied*, 119 S. Ct. 255 (1998). Therefore, relying on counsel's affidavit, which is not controverted, and the certificate of service date, the Court finds that Plaintiffs' response was timely filed on October 5 and the

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[2] Under Fed. R. Civ. P. 36(a), a "matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection. . . . "

requests for admissions are not deemed against Plaintiffs. Accordingly, the City's Supplemental Motion for Summary Judgment based on claimed deemed admissions is DENIED.

B. Section 1983 Claim

Plaintiffs allege in their Complaint that the fatal shooting of Barnes by the City's police officers "amount[ed] to an unreasonable search and seizure in violation of the Fourth Amendment . . . for which redress is provided by 42 U.S.C. § 1983."[3] Compl. ¶ 28. A municipality can be held liable under § 1983 only when the municipality itself causes a constitutional deprivation. *See City of Canton v. Harris*, 109 S. Ct. 1197, 1203 (1989); *Monell v. Department of Soc. Servs.*, 98 S. Ct. 2018, 2037-38 (1978). This requires the execution of a city policy or custom which results in an injury. *See Board of County Comm'rs v. Brown*, 117 S. Ct. 1382, 1388 (1997); *Monell*, 98 S. Ct. at 2037-38. There are two fundamental requirements for holding a city liable under § 1983; culpability and causation. *See Brown*, 117 S. Ct. at 1388; *Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998), *Petition for cert. filed*, 67 U.S.L.W. 3240 (U.S. Sept. 22, 1998) (No. 98-507). "First, the

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[3] The Fourth Amendment prohibits unreasonable searches and seizures by police officers and also provides the " 'primary source[] of constitutional protection against physically abusive government conduct.' " *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996) (quoting *Graham v. Connor*, 109 S. Ct. 1865, 1870-71 (1989)). This includes the use of deadly force which is alleged to be excessive. *See id.*

municipal policy must have been adopted with 'deliberate indifference' to its known or obvious consequences. Second, the municipality must be the 'moving force' behind the constitutional violation." *Snyder*, 142 F.3d at 795; *Brown*, 117 S. Ct. at 1394; *Canton*, 109 S. Ct. of 1204-05. A high standard of proof is required before a municipality can be held liable under § 1983. *See Snyder*, 142 F.3d at 796; *see also Brown*, 117 S. Ct. at 1394 (stating that "[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability [in appropriately] collapses into respondeat superior liability"); *Canton*, 109 S. Ct. at 1208 (stating that § 1983 liability should not be imposed absent a showing of "a high degree of fault on the part of city officials" (O'Connor, J., concurring)).

Plaintiffs allege that the City's "actual policies, procedures, practices, and customs [were] a producing and proximate cause of the unwarranted use of force" when the City's police officers complied with them. Compl. ¶ 20. Plaintiffs do not allege or provide summary judgment evidence, however, about any particular written policy formally adopted by the City that resulted in the allegedly excessive use of force. "Absent a formal governmental policy, [Plaintiffs] must show a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity.' " *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992)), *cert. denied*, 117 S. Ct. 1249 (1997). A single constitutional violation cannot constitute an actionable municipal policy or custom. *See Rodriguez v. Avita*, 871 F.2d 552, 554-55 (5th Cir. 1989) (holding that a plaintiff must offer proof of

more than one violent incident before liability can be imposed for the City's failure to provide adequate training). Instead, Plaintiffs must demonstrate that there is "at least a pattern of similar incidents in which the citizens were injured." *Id.* at 554. A custom must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Monell,* 98 S. Ct. at 2036.

In this case, Plaintiffs neither allege in their Complaint nor provide any summary judgment evidence that the police officers' actions were typical or have occurred in the past; they have not alleged or provided any evidence that the shooting of Barnes was more than a single, isolated incident. Even if the officers did use excessive force,[4] "an unjustified shooting by a police officer cannot, without more, be thought to result from official policy." *City of St. Louis v. Praprotnik,* 108 S. Ct. 915, 924 (1988) (citing *City of Okla. City v. Tuttle,* 105 S. Ct. 2427, 2435, 2439-40 (1985)).

"Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." *Trevino v. Gates,* 99 F.3d 911, 920 (9th Cir. 1996). In this case, Plaintiffs have

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[4] No determination is made regarding whether the officers used excessive force in this case because Plaintiffs have failed to establish a *prima facie* case that the City had a policy or custom that caused the alleged constitutional deprivation. "[A] deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation." *Board of County Comm'rs v. Brown,* 117 S. Ct. 1382, 1389 (1997).

provided no summary judgment evidence and have not alleged that the City's police officers have a history of pattern of using excessive and unreasonable force. Plaintiffs have failed to establish that the City had a policy or custom which, when followed, caused the complained-of constitutional deprivation. Therefore, Plaintiffs have failed to establish a *prima facie* case under § 1983.

Plaintiffs also allege that the City's inadequate supervision and training of the police officers resulted in the unwarranted use of force. *See* Compl. ¶¶ 21-22. As part of their *prima facie* case, Plaintiffs must establish that the City was deliberately indifferent to Barne's constitutional rights by failing to train or supervise the police officers. *See Snyder*, 142 F.3d at 799. Deliberate indifference arises when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton*, 109 S. Ct. at 1205. "[A] plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998) (citing *Board of County Comm'rs v. Brown*, 117 S. Ct. 1382, 1390-91 (1997)); *accord Canton*, 109 S. Ct. at 1205; *Snyder*, 142 F.3d at 799.

> That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city for the officer's shortcomings may have resulted from factors other than a faulty training program. . . . Neither will it suffice to prove that an injury or accident could have been

> avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.

Canton, 109 S. Ct. at 1206.

The only evidence presented by Plaintiffs is the affidavit of Dr. McCauley, a forensic examiner whom Plaintiffs regard as an expert witness.[5] He testified about various actions taken by the officers which he contends were "unacceptable" and "unreasonable" because they did not comport with the accepted police practices of other municipalities. (McCauley Aff., Pls.' Resp. Mot. Summ. J., Ex. A.) "[T]o prove a municipality's malevolent motive, plaintiffs must introduce more evidence than merely the opinion of an expert witness." *Synder*, 142 F.3d at 799 (citing *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988)). Nonetheless, Dr. McCauley's opinion provides no evidence that the City was deliberately indifferent and made a conscious choice to train or to supervise the officers inadequately. *See, e.g., id.* (finding that the expert's testimony that the city "failed to meet 'national standards' was unsupported by any facts establishing the city's purportedly bad motive"). Plaintiffs have provided

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[5] The City objects to the affidavit of R. Paul McCauley attached to Plaintiffs' Response to Defendant's Motion for Summary Judgment and moves to strike it from the evidence because he was not properly designated as an expert. Dr. McCauley was listed as an expert in Plaintiffs' Designation of Experts which was submitted within the time frame set forth on the Docket Control Order. Furthermore, based on the discussion herein, consideration of the affidavit has no prejudicial effect on the City. For purposes of this summary judgme it motion, the City's Objection to Plaintiffs' Summary Judgment Evidence is OVERRULED.

no summary judgment evidence about the City's training program; they have not cited any particular aspect of the City's training program which is deficient; and they have neither alleged in their Complaint nor presented summary judgment evidence that the City knew or should have known that its training and supervision programs were inadequate. Moreover, Plaintiffs have offered no summary judgment evidence that the City was deliberately indifferent by failing to train or supervise its officers.

Therefore, Plaintiffs have failed to establish a *prima facie* case that the City was the moving force behind the alleged constitutional deprivation by adopting a policy or custom that resulted in Barnes being denied his constitutional right or that the City acted with deliberate indifference by failing to train and/or supervise the officers adequately. The City's motion for summary judgment is therefore GRANTED on Plaintiffs' § 1983 claim.[6]

C. Texas Tort Claims Act

The City first contends that it did not receive timely notice of Plaintiffs' claim because notice was not provided within 90 days after the date of the injury as required by the City's charter. However, under the Texas Tort Claims act ("Act"), notice is not required if the City

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[6] Plaintiffs have objected to Exhibits G through L of the City's summary judgment evidence, which contain police witness statements. These exhibits, however were not considered in connection with the motion for summary judgment. Thus, Plaintiffs' Objections to the City's Summary Judgment Evidence are OVERRULED as MOOT.

had actual notice that a death occurred. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c). The City does not dispute that it had actual notice of Barnes's death, thereby relieving Plaintiffs of the notice requirement.

The City also contends that it is immune from liability for Plaintiffs' claim asserted under the Act; Plaintiffs do not rebut the City's contention. "Under the doctrine of sovereign immunity, the [City] is not liable for the negligence of its employees absent constitutional or statutory provision for liability." *See University of Tex. Med. Branch at Galveston v. York*, 871 S.W.2d 175, 177 (Tex. 1994) (citing *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976)). However, a governmental unit can be sued for damages that are specifically allowed by the Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025, 101.001(2) (B). Under the Act, the City can be held liable for death which results from the use of a motor vehicle or tangible personal or real property.[7] *See Id.* § 101.021. The Act does not apply, however, to any claim "arising out of assault, battery, false imprisonment, or any other intentional tort." *Id.* § 101.057.

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[7] Plaintiffs allege that the City is

> liable for personal injury and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment if the injury or death is caused by the use of tangible personal property and if the governmental unit would, were it a private person, be liable to the Plaintiffs according to Texas law.

Compl. ¶ 29.

Plaintiffs pled the Act's statutory language in their Complaint, including an alternative theory of recovery based on the officers' alleged negligence in using tangible personal property (*i.e.*, their firearms) to cause Barnes's death.[8] *See* Compl. ¶¶ 18-19, 25-26. However, "Plaintiffs have described their claim[] arising from the shooting as the intentional tort of excessive force." *Huong v. City of Port Arthur*, 961 F. Supp. 1003, 1008 (E.D. Tex. 1997); *see also City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (Tex. App. 1990) (holding that there was no waiver of governmental immunity for claims arising out of the intentional torts of false arrest and excessive force). Plaintiffs' primary allegation is that the officers shot Barnes "in conscious disregard and with deliberate indifference to" Barnes's constitutional rights and that their actions were "intentional, malicious, and/or reckless." Compl. ¶¶ 15, 17. Furthermore, the uncontroverted summary judgment evidence describes Barnes's death as resulting from an intentional shooting. Officer Wilhite stated in his affidavit that he "intentionally" fired four rounds from his hand gun at Barnes (Wilhite Aff. at 2, Defs.' Mot. Summ. J., Ex. D); Officer Red also stated that he shot at Barnes after seeing a gun pointed at him (Red Aff. at 2, Defs.' Mot. Summ. J., Ex. C). "Plaintiffs cannot circumvent the intentional tort exception to waiver of municipal liability by simply pleading negligence when the shooting event

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[8] Any claims asserted by Plaintiffs for negligent supervision or negligent training are DISMISSED because they do not involve the use of tangible personal property for which a waiver of immunity is provided by the Act. *See Kesler v. King*, No. Civ. A. G-96-703, 1998 WL 858838, at * 19 (S.D. Tex. Dec. 7, 1998).

upon which they base their claims is actually an intentional tort." *Huong*, 961 F. Supp. at 1008-09; *accord Drain v. Galveston County*, 979 F. Supp. 1101, 1104-5 (S.D. Tex. 1997) (holding that "[a] plaintiff cannot pursue pendant state claims under the Texas Tort Claims Act where they are based on a single event, an event alleged under a contemporaneous § 1983 cause of action to be an intentional tort" (citing *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994))); *Little v. Schafer*, 319 F. Supp. 190, 192 (S.D. Tex. 1970) (holding that the Texas Tort Claims Act exception to liability for intentional torts cannot be avoided by alleging negligence when the essence of the claim arises from an intentional tort). Therefore, the city's motion for summary judgment is GRANTED on Plaintiffs' claim under the Texas Tort Claims Act.

IV. Order

Based on the foregoing, it is

ORDERED that Defendant City of Houston's Supplemental Motion for Summary Judgment (Document No. 37) is DENIED. It is further

ORDERED that Defendant City of Houston's Motion for Summary Judgment (Document No. 36) is GRANTED, and Plaintiffs' claims asserted against Defendant City of Houston are DISMISSED. It is further

ORDERED that Plaintiffs' Motion for a Gatekeeper Hearing Under *Daubert* (Document No. 43), Defendant's Motion to Strike Plaintiffs' Experts (Document No. 44-1),

and Defendant's Alternative Motion for a *Daubert* Hearing regarding Plaintiffs' Experts (Document No. 44-2) are DENIED AS MOOT.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, this 19th day of January, 1999.

/s/ Ewing Werlein, Jr.
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20865

DOROTHY J BARNES, Individually, and as next friend to Derrick Todd Barnes Jr, a minor child

Plaintiff – Appellant

v.

THE CITY OF HOUSTON; ET AL

Defendants

THE CITY OF HOUSTON; OTHER UNKNOWN OFFICERS OF THE HOUSTON POLICE DEPARTMENT

Defendants – Appellees

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 5, 2000)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

PER CURIAM:

[X] Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

[ ] Treating the Petition for Rehearing for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitioner for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

REHG-6a

APPENDIX E

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. for the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX F

Fed. R. Civ. P. RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished,

and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987.]